

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Public Safety Communications in the)	WT Docket 02-
55)	
800 MHz Band)	
)	
Consolidating the 800 and 900 MHz)	
Industrial/Land Transportation and Business Pool)	
Channels)	
)	
Amendment of Part 2 of the Commission's Rules)	ET Docket No. 00-258
To Allocate Spectrum Below 3 GHz for Mobile)	
And Fixed Services to Support the Introduction of)	
New Advanced Wireless Services, including Third)	
Generation Wireless Systems)	
)	
Petition for Rule Making of the Wireless)	RM-9498
Information Networks Forum Concerning the)	
Unlicensed Personal Communications Service)	
)	
Petition for Rule Making of UT Starcom, Inc.,)	RM-10024
Concerning the Unlicensed Personal)	
Communications Service)	
)	
Amendment of Section 2.106 of the Commission's)	ET Docket No.
95-18)	
Rules to Allocate Spectrum at 2 GHz for use by)	
The Mobile Satellite Service)	

OPPOSITION TO NEXTEL'S PETITION FOR RECONSIDERATION

I. INTRODUCTION AND SUMMARY

On January 27, 2006, Nextel filed a Petition for Reconsideration in FCC proceeding 02-55. In general, Nextel claims they are being treated unfairly and not in accordance with the FCC's "value for value" principle, established in the Report & Order (released August 6, 2004). It is incredible that the multi-billion dollar windfall Nextel has already received is not enough for them.

I have previously filed a petition for reconsideration (dated December 22, 2004) in which I challenged the windfall being given to Nextel. The FCC response to my petition was an overall denial of the issues I raised in my petition. Regardless of the FCC's response to my petition, it does not change the fact, as evidenced in the record, that Nextel is reaping a multi-billion dollar windfall.

Since Nextel itself is questioning its treatment under the "value for value" principal, it is appropriate to revisit the entirety of the "value for value" issue.

There can be no doubt that the "valuation" issue is one of the most significant, far-reaching and highly contested aspects of this proceeding. As FCC Chairman Michael Powell stated in his press release (dated July 8, 2004) upon the adoption of the FCC's Report & Order— *"This proceeding has seen some of the most ruthless lobbying I have*

ever seen.” The contention was never about the core issue of improving public safety communications. None of the parties (who opposed the Nextel and/or the Consensus Plan and/or offered alternative solutions) in this proceeding ever questioned the need to resolve the interference problem. Instead, the challenges were to which of the multiple solutions would be selected and whether or not a solution would result in a “windfall” for Nextel.

As noted in the excerpts from the R & O (following this introduction), the FCC has clearly recognized and embraced the requisite distinction between “improving public safety communications” versus “improving Nextel.” Indeed, this distinction was articulated by the FCC in paragraph 76 of the Report & Order by stating – “While addressing public safety concerns is a priority of the highest order, it is in the public interest to do so in a way that does not result in a windfall for Nextel.” As FCC Chairman Powell stated in his press release (dated July 8, 2004) upon the adoption of the FCC’s Report & Order – “*In many ways, we have adopted a plan along the lines that Nextel has urged. We have not, however approved its plan outright because we always remain cognizant that our allegiance is only to the public good, not the private good.*” Chairman Powell further stated – “*We have taken prudent steps to try to protect the plan, always cognizant of the fact not to give away some of the most valuable spectrum we have for a song.*”

Although the FCC's words and their clear intent and objective (based on equitable and public interest considerations) in this proceeding was to ensure Nextel did not receive any windfall, the FCC has failed miserably on this issue. **The FCC has, in fact, based on evidence in the record and through manifest errors given a multi-billion dollar windfall to Nextel.**

II. RELEVANT EXCERPTS FROM FCC REPORT & ORDER

As stated in paragraph 2, the FCC's four "paramount goals" in the proceeding were to find a solution that: (1) abates unacceptable interference to public safety system; (2) results in responsible spectrum management; (3) provides additional 800 MHz spectrum for public safety agencies; and (4) *is both equitable and imposes minimum disruption to activities of all 800 MHz band users.*

The following are excerpts from the Report & Order (released August 6, 2004). I am presenting them here as they are most relevant to Nextel's claims of unfair treatment, versus the inappropriate windfall they are receiving. The excerpts are referenced to the Report & Order via paragraph numbers.

(1) Paragraph 5. "To ensure that by these actions Nextel, other licensees and the public are treated equitably, and that Nextel does not realize any windfall gain, we

confer these 1.9 GHz spectrum rights on a 'value for value' basis. Under this approach, we credit Nextel for (1) the net value of spectrum rights that Nextel is relinquishing to public safety, CII and other 800 MHz band licensees; (2) the actual cost of 800 MHz band reconfiguration (including both Nextel's costs to support relocation by other licensees and Nextel's own relocation costs); (3) costs incurred by Nextel to clear the 1.9 GHz band, less any reimbursed expenses. If these combined offsets ultimately total less than the value determined by this report and order for the 1.9 GHz spectrum rights, we require Nextel to make a payment to the U.S. Treasury at the conclusion of the transition process equal to the difference."

*(2) Paragraph 6. "Nextel may have to share spectrum in the 817-824 MHz / 862-869 MHz segment of the reconfiguration band with other ESMR licensees. To the extent that ***such sharing may reduce the amount of 800 MHz spectrum available to Nextel.*** We (FCC) believe we should provide regulatory flexibility necessary for ***Nextel to make up the shortfall*** by using 900 MHz band channels. We (FCC) therefore amend our rules to allow 900 MHz band licensees to initiate CMRS operations on their currently authorized spectrum or to assign their authorizations to others for CMRS use."*

(3) Paragraph 32. The FCC rejected the so-called "Consensus Plan" (which was "megahertz-for-megahertz" based), whereby Nextel would have "exchanged" a total of 10.5 MHz (4 in the 700 MHz band, 2.5 in the 800 MHz band and 4 in the 900 MHz band) for 10 MHz in the 1.9 GHz band. The FCC stated: "We reject this approach,

inter alia, because we perceive insufficient benefit to the public, and do not find the spectrum rights offered to be comparable in value to the spectrum rights sought. Instead, to ensure that the public and our licensees including Nextel are treated equitably, and that Nextel does not gain undue advantage, we will compensate Nextel on a ‘value for value’ basis.”

(4) Paragraph 72. “The plan we adopt today places Nextel in a comparable position to that which it now occupies and contains a cash payment mechanism (to the U.S. Treasury) that would become effective if necessary to ensure that Nextel does not reap a windfall from savings in reconfiguration costs.”

(5) Paragraph 75. “ Our authority to require a cash payment from Nextel in the future if needed to prevent a windfall that otherwise might flow from its new rights to use the 1.9 GHz spectrum derives from sections 4(i) and 303(r) of the Act.” “In this way, savings in reconfiguration expenses will be realized as a public benefit (i.e., a payment to the U.S. Treasury), rather than providing Nextel an unwarranted windfall from the license modification.”

(6) Paragraph 76. “In this case, requiring a payment (from Nextel) allows us to address the interference problems in the 800 MHz band and provide public safety agencies with additional spectrum rights in a way that places Nextel in a comparable position to that which it now occupies. While addressing public safety concerns is a

priority of the highest order, it is in the public interest to do so in a way that does not result in a windfall for Nextel.” “.....requiring a payment from Nextel to maintain an exchange commensurate with the value of the spectrum it is receiving furthers the public interest objectives of the Communications Act and is consistent with the policy Congress articulated in Section 309(j) -- [“of recover[ing] for the public of the portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource”].”

(7) *Paragraph 87.* The FCC’s R&O required the following acknowledgement from Nextel -- “....., by accepting the license under the terms of the Order, **Nextel acknowledges that it has studied the law and the facts and has made its own estimate of the risks that implementation of the Order may be delayed by judicial review and the Order may, in fact, be declared invalid.** Nextel shall acknowledge that it has accepted the risk of delay and invalidity and that, therefore, it cannot recover its costs or any damages associated with implementation or non-implementation of the Order from the Commission or any governmental agency.”

(8) *Paragraph 212.* “We (FCC) are **sensitive to the arguments** made by several parties that granting Nextel spectrum rights in the 1.9 GHz band could result in an undeserved ‘windfall’ to Nextel. To ensure that Nextel is treated equitably but does

not realize any windfall gain, we provide for compensation of Nextel on a 'value for value' basis.

(9) Paragraph 277. "The record reflects considerable disagreement among parties on whether the grant of 1.9 GHz spectrum rights to Nextel constitutes equitable compensation or an unwarranted windfall. Many of these parties further argue that the market value (FMV) of the 1.9 GHz spectrum far exceeds the value of the relinquished spectrum and other costs that Nextel would incur under the Consensus Parties' proposal."

(10) Paragraph 278. "We (FCC) conclude that a 'value for value' approach is the most appropriate for determining equitable compensation in this instance."

(11) Paragraph 283. "As an initial matter, we (FCC) note that the valuing of spectrum is not an activity in which the Commission typically engages."

(12) Paragraph 287. "In order to identify an appropriate value amount that is attributed to Nextel for receipt of the 1.9 GHz spectrum rights, one must go beyond identifying a reasonable valuation range and place a specific value on the 1.9 GHz license."

(13) Paragraph 293. “....., we (FCC) find that an approach based on comparable spectrum sales is most reliable.” Two recent benchmark secondary market transactions....provide strong evidence of the current FMV of the 1.9 GHz spectrum. These are....

- (1) the December 2002 purchase by Verizon Wireless of fifty Northcoast licenses at a price (\$750 Million for 10 MHz covering 47 million pops) equating to approximately \$1.58 per MHz-pop, and*
- (2) the Fall 2003 agreement to purchase by Cingular Wireless of Nextwave spectrum in thirty-four cities at a price (\$1.4 Billion for 10 MHz covering 84 million pops) equating to approximately \$1.66 per MHz-pop.”*

(14) Paragraph 313. “....., we (FCC) do not agree with Nextel’s contention that its use of iDEN means that non-contiguous and contiguous spectrum rights should be valued equally. Even in an iDEN configuration, Nextel will realize some increase in technical efficiency as a result of using contiguous spectrum.”

(15) Paragraph 317. “In particular, we (FCC) focus on differences in technical efficiency that affect iDEN operation on contiguous versus non-contiguous spectrum. While these differences are difficult to quantify with precision, we (FCC) have identified variables that we believe provide a reasonable measure of the increase in efficiency that Nextel will realize as a result of obtaining rights to contiguous spectrum, and which can be used to provide an appropriate discount on the value of

the non-contiguous spectrum it is relinquishing. We (FCC) set forth this analysis below.”(See in paragraph 318).

(16) Paragraph 318. “Interleaved Channels. In the 809.75-816 / 854.75-861 MHz (i.e., channels 151 to 400), 80 SMR channel pairs totaling 4 megahertz of bandwidth are interleaved with public safety and B/ILT channels. The interleaved nature of the band puts twenty (20) of these channels at ‘band-edges’ adjacent to non-SMR spectrum, including public safety spectrum. “Using the OOB limits applicable to EA licensee, we (FCC) assume that if Nextel is operating on one of its band-edge channels in the vicinity of an adjacent-channel non-SMR licensee, Nextel must limit use of its band-edge channel to avoid interference. We (FCC) estimate that this reduces the utility of band-edge channels by fifty-percent (50%), because they can still be used in areas where the adjacent non-SMR licensee is operating on a non-band-edge channel. A fifty-percent (50%) impairment to one-quarter (20 of 80) of the eighty(80) interleaved channels translates to a 12.5 percent (i.e., 50% of 25%) reduction in capacity – effectively one out of every eight channels that Nextel is unable to use on interleaved spectrum but could be used if the same channels formed a single contiguous block. Thus, we (FCC) believe a 12.5 percent discount is an appropriate benchmark for the technical efficiency loss in an iDEN configuration from the spectrum being non-contiguous.”

(17) *Paragraph 321. “General Category. The 806-809.75 / 851-854.75 MHz (i.e., channels 1 to 150) General Category band more-closely resembles contiguous spectrum than the 800 MHz Interleaved band, because it is not divided into interleaved band segments specifically assigned to SMR, public safety and B/ILT. Instead, the General Category band is segmented into six contiguous twenty-five channel blocks licensed on an EA basis. The vast majority of these EA licenses are held by Nextel. The band is not fully contiguous, because EA licensees must protect grandfathered site-based licenses in the General Category band.” “But in contrast to the interleaved band, we (FCC) do not consider it necessary to discount Nextel’s General Category spectrum rights holdings based on the presence of adjacent channel non-SMR incumbents.”*

III. NEXTEL’S MULTI-BILLION DOLLAR WINDFALL

There can be no doubt that the “valuation” issue is one of the most significant, far-reaching and highly contested aspects of this proceeding. As FCC Chairman Michael Powell stated in his press release (dated July 8, 2004) upon the adoption of the FCC’s Report & Order– *“This proceeding has seen some of the most ruthless lobbying I have ever seen.”* The contention was never about the core issue of improving public safety communications. None of the parties (who opposed the Nextel and/or the Consensus

Plan and/or offered alternative solutions) in this proceeding ever questioned the need to resolve the interference problem. Instead, the challenges were to which of the multiple solutions would be selected and whether or not a solution would result in a “windfall” for Nextel.

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Contrary to the FCC's objective to ensure Nextel did not receive any windfall, they gave Nextel a 2 to 3 Billion Dollar (or more) windfall. This windfall emanates from the manifest errors in the various calculations for the components of the "value for value" equation. Specifically, the FCC (A) undervalued the 10 MHz of 1.9 GHz given to Nextel by at least \$1.5 Billion; (2) Overvalued the 800 MHz being relinquished by at least \$1.3 Billion; and (3) provided for a combination of unsupported, unjustified credits that are nothing more than a "hocus-pocus" mechanism giving Nextel a further windfall of at least \$650 Million.

(A) Undervaluation Of 1.9 GHz By At Least \$1.5 Billion

As noted above (R&O, paragraph 293), the FCC determined the value of the 1.9 GHz based on two specific secondary market transactions. The FCC determined the dollar per MHz per pop calculation for each of these two transactions, it then calculated the simple average of these two and then added a 5% premium for Nextel being provided with nationwide spectrum. The first transaction that the FCC looked at was the Verizon/Northeast transaction from December 2002, which included approximately 47 million licenses pops with a total purchase price of \$750 million dollars, which translated to \$1.58 per MHz per pop. The second transaction (Fall 2003) was the

Cingular/Next Wave which included approximately 84 million license pops in a transaction valued at \$1.4 billion dollars which translated to \$1.66 per MHZ per pop. The average of the \$1.58 and the \$1.66 equals \$1.62 then FCC applied at 5% premium to arrive at the \$1.70 per MHZ per pop which was then used to value the 1.9 GHz.

The Report and Order makes reference to more recent transactions but merely indicates that these transactions serve to confirm their conclusion in using the two transactions that were actually part of the FCC calculation. Unfortunately the FCC's logic in this analysis is fatally flawed. The flaw in the FCC logic is that more recent transactions clearly indicate that the MHz per pop value of \$1.70 is far too low. One of the more recent transactions that are particularly noteworthy is the sale Next Wave licenses.

On July 8, 2004 there was an auction conducted whereby three licenses of Next Wave were sold, one in the New York market and two in Florida markets. This was particularly noteworthy because Next Wave was in bankruptcy and as a result the auction was under the purview of the bankruptcy court. The Next Wave documents in their bankruptcy filing indicate that the terms and conditions of the auction were approved by the bankruptcy court and it included the FCC's input. In this auction they established a minimum bid which is equal to 50% of the FCC auction 35 price for these markets. This is noteworthy because the auction 35 average price was \$4.18 per MHZ per pop. Even though the auction 35 transactions were not consummated as a

result of the Next Wave bankruptcy proceeding nonetheless the various bidders in good faith bid the amounts as they did and there could be no doubt that if the Next Wave bankruptcy did not take place the FCC would have received those monies from the various bidders.

The most noteworthy auction purchase on July 8, 2004 was Verizon purchase of the New York 10 MHz license. Verizon bid and will pay \$930 million dollars for New York license alone. This is particularly noteworthy because the transactions selected by the FCC for determining 1.9 GHz value (the Verizon/Northeast transaction) included a 10 MHz license for New York. As noted above this transaction was for a total of \$750 million dollars (not only the New York license but also other licenses). There is a clear discrepancy in the FCC using the Verizon/Northeast transaction because it was only \$750 million (even though it included the New York license).

To determine a revised calculation (in essence adjusting the transaction selected by the FCC) one can look to a valuation report filed by Nextel whereby it included an allocation of the \$750 million dollars in the Verizon/Northeast transaction. There schedule indicated that their value for the New York licenses was \$481 million dollars. The simple adjustment to the FCC calculation would be to replace the value for the New York license in that you would remove the \$481 million and replace it with the \$930 million.

This simple adjustment results in the value of \$2.52 per MHZ per pop. Using this as the revised transaction value in the first transaction the FCC included in their calculation and adding that to second transaction they used results in a simple average of \$2.09 per MHZ per pop. Applying the 5% premium to this number results in \$2.19 per MHZ per pop. Applying that to the 286 million pop results in a total value of approximately \$6.3 billion dollars which is \$1.5 billion dollars greater than the FCC had valued the spectrum.

The reasonableness of the \$6.3 billion revised valuation can be seen in the Verizon offer for the purchase of the spectrum at \$5 billion dollars. The \$5 billion dollars was going to be Verizon's initial bid should the spectrum have been auctioned and one can assume they would have increased their initial purchase. The \$6.3 billion dollars reflects what would have been a 25% higher bid should those have gone to auction.

Another recent transaction that should be taken into consideration is Verizon's agreed purchase of additional Next Wave licenses. Verizon has announced that they will be purchasing a total of 102 million licenses pops for a total of \$3 billion dollars. This calculates to \$2.94 per MHZ per pop. However we believe that this number is on to the high side since this transaction includes two licenses for the New York market. If one assumes that the \$930 million dollar purchase price from the July auction would be the value assigned to the two New York licenses in the more recent \$3 billion dollar transaction, one can take the \$3 billion dollars minus two times \$930 million dollars

which leaves \$1.1 billion for the remainder of the licenses pops that are being acquired, which is 63 million license pops. This translates to dollars per MHz per pop of \$1.82. Thus, this transaction suggests that the value of nationwide spectrum can be determined by separating the New York licenses at \$930 million dollars and then apply \$1.82 per MHz per pop to the remainder of licenses pops which would be \$1.82 times approximately 266 million pops which results in a total of approximately \$5.8 billion dollars. However this does not reflect any premium for nationwide spectrum, thus a 5% increase or premium would result in a approximately \$6.1 billion dollars for the nationwide spectrum which translates to \$2.12 per MHz per pop which is very close to the \$2.19 calculation decision above.

My petition for reconsideration pointed to a sale of a New York license on July 8, 2004 at a value that, for reasons discussed above, completely discredited the FCC's valuation calculation. In doing so, I proved that the FCC undervalued the 1.9GHz spectrum by at least a billion dollars, thus giving Nextel a "windfall". The FCC's response to my petition is that they could not take this into account as it would delay a final resolution in the proceeding. This is false excuse for two reasons. First, the sales price for the New York license in question was established in the Next Wave bankruptcy case, with the involvement of the FCC, as reflected in a filing in that case on June 4, 2004. Thus, the FCC knew of this valuation for likely weeks before June 4, which was plenty of time to consider it in this proceeding. Second, the FCC revisited the valuation issue subsequent to July 8, 2004, by increasing Nextel's spectrum value

by almost \$500 Million on December 22, 2004. This was nearly six months after the R&O was adopted. Thus, contrary to the FCC's response to my petition, they had plenty of time.

(B) Overvaluation Of 800 Mhz Relinquished By At Least \$1.3 Billion

The FCC values Nextel's General Category spectrum at \$1.70 per MHZ/pop, however it uses a discounted value of \$1.49 per MHZ/pop for the interleaved Spectrum. This is a 12.5% discount due to an estimate of restricted use due to adjacent channels. However, the FCC's error in this calculation is that they only recognize 20 of Nextel's interleaved channels as being "adjacent" to other frequencies. The reality is that it should be three times that number. Additionally, there is no justification for not using the discounted value for the General Category channels since (1) Nextel claims to have an average of approximately 4.5 MHz of the General Category spectrum, which is only 60% of the General Category spectrum. (2) The remaining 3.0 MHz air primarily site-specific licenses that are randomly scattered through out the band, thus a significant portion of Nextel's General Category spectrum are subject to adjacent channel restrictions. (3) This spectrum configuration is confirmed by reviewing the FCC report to Congress regarding 800 MHz spectrum, which is in the record in this proceeding.

Using a discounted value of \$1.49 for the General Category spectrum (instead of the \$1.70) reduces the valuation of Nextel's spectrum by \$270 million ($\$1.70 - \$1.49 = \$0.21 \times 286 \text{ million} \times 4.5 \text{ MHz} = \270 million).

The FCC's determination of a 12.5% discount applied to full spectrum value of \$1.70 is based on an erroneous calculation of the true number of adjacent channels. Thus, the 12.5% discount is too low. An additional discount of at least 25% is reasonable. This additional 25% discount reduces Nextel's spectrum valuation by \$547 million ($\$1.70 \times 25\% \times 4.5 \text{ MHz} \times 286 \text{ million} = \547 million) for the General Category spectrum and \$426 million ($\$1.49 \times 25\% \times 4.0 \text{ MHz} \times 286 \text{ million} = \426 million) for the relinquished spectrum (middle 80 of 2.96 MHz and BIL of 1.04 MHz).

(C) Unjustified / Unsupported Credits Of At Least \$650 Million

(1) Restricted Use Credit

The FCC's valuation formulas indicate that 1 MHz of Nextel's spectrum at the band edge will have reduced utility. Thus they apply a 50% discount to this 1 MHz, which at \$1.70 per MHz/pop and \$286 million pops is a \$243 million discount. This is inappropriate since there is a Guard Band and an Expansion Band adjustment to Nextel's spectrum which provides 2 MHz of separation between Nextel and public safety channels. Furthermore, a 50% discount of 1 MHz (20 paired channels) is excessive in comparison to the FCC's discount of Nextel's "relinquished" spectrum

which only had immediately adjacent channels as a factor in determining restricted use.

(2) Credit for Filters

Nextel claims they will spend \$407 million for filters in order to comply with the “new” interference regulations. The idea of giving a licensee a “credit” for costs incurred in complying with FCC regulations is unjustified. Various new regulations have resulted in significant costs to licensees. Example in the wireless industry include E911, CALEA and local number portability. The additional filters should be viewed as a compliance cost that does not qualify for a credit by Nextel.

(3) Credit for System Capacity Costs

Nextel is going to claim an entitlement for capital expenditures to “maintain capacity” in its system. There has never been any data or estimate or proper clarification of what this means, thus it will likely be another way for Nextel to “backdoor” an increase to their “windfall”.

CONCLUSION

Nextel's claims of being treated unfairly should be summarily dismissed. Nextel is being compensated for "sharing" the new ESMR band by being given expanded 900 MHz operating rights, thus it is not entitled to any further compensation. The FCC should, as Nextel has requested, reconsider how Nextel has been treated under the "value for value" principle, and make the appropriate adjustments. The FCC should reject Nextel's position that there agreement to the FCC plan makes any changes somehow improper.

Respectfully Submitted

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